No. 17-965

In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, et al.,

Petitioners,

v.

STATE OF HAWAII, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

KIMBERLEE WOOD COLBY
Counsel of Record
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
703-894-1087
kcolby@clsnet.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

This brief addresses only the question whether Proclamation No. 9645 violates the Establishment Clause.

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INTEREST OF AMICI CURIAE[1]

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, founded in 1963 and dedicated to the defense of religious freedom. CLS works to protect all citizens' free exercise and free speech rights, both in this Court and Congress. The freedoms of religious exercise, expression, and association are essential to a free society. Our Republic will prosper only if the First Amendment rights of all Americans are protected, regardless of the current popularity of their religious exercise and expression. For that reason, CLS was instrumental in passage of landmark federal legislation to protect persons of all faiths, including: 1) the Equal Access Act of 1984, 98 Stat. 1302, 20 U.S.C. § 4071 *et seq.*, which protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses; 2) the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, which protects the religious freedom of persons of all faiths; and 3) the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, which protects religious freedom for congregations and institutionalized persons of all faiths.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches,

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[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. The consent of Petitioners is on file with the Clerk; the consent of Respondents is submitted with the brief.

denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately organized evangelical ministries. It believes that religious freedom is God-given and thereby unalienable, that it is a right prior to the state that is recognized in and protected by the First Amendment and other federal laws, and that the proper ordering of church-state relations places a restraint on governmental authority that ensures the autonomy of religious organizations. NAE believes that civil government has a high duty to protect the religious freedom of peoples of all faiths.

SUMMARY OF ARGUMENT

This brief addresses only the question whether Proclamation No. 9645 violates the Establishment Clause. Further, it addresses only the principles of law under the Establishment Clause relevant to understanding this case. Amici do not take the next step and apply these principles of law to Petitioners' actions, nor do Amici urge upon the Court suggested findings of fact concerning whether or not Petitioners did violate the Establishment Clause in issuing Proclamation No. 9645.

The Establishment Clause prohibits government from intentionally discriminating among religions. Proof of animus is not required.

The State of Hawaii was correct to invoke the Establishment Clause rather than the Free Exercise Clause. The Establishment Clause is a means of redress for nonreligious injury such as proprietary harms and economic loss.

The Religion Clauses claims by the individual Respondents (Dr. Ismail Elshikh and John Does 1 and 2) and the associational Respondent (Muslim Association of Hawaii, Inc.) are different from those brought by the State of Hawaii. These Respondents are Muslim, and they allege religious injury as a result of Proclamation No. 9645. These Respondents were correct to invoke the Free Exercise Clause as a remedy for their religious harm. Having decided the case on statutory grounds, the court below did not reach these free-exercise claims. And the Free Exercise Clause claims are not before this Court because of the limited scope of the grant of the petition for writ of certiorari. The claims are not abandoned, however, and should there be a remand for further consideration on the merits, the Free Exercise Clause claims remain as a possible basis for granting a remedy personal to the individual and associational Respondents.

The individual and associational Respondents also have sought relief under the Establishment Clause for their alleged religious harm. That claim is within the scope of the grant of the petition for

certiorari and thus properly a question now before this Court. The statement of the claim is that Proclamation No. 9645, by intentionally targeting Muslims, has damaged the immigration status of these individual and associational Respondents or that of a close family member, or hampered the ability to travel over international borders. This is one of those instances where the Establishment and Free Exercise Clauses partly overlap. However, if there is a successful claim under the Establishment Clause, it will warrant an injunction of broader scope than is available under the Free Exercise Clause, namely that Proclamation No. 9645 is facially unconstitutional.

ARGUMENT

This brief addresses only the question whether Proclamation No. 9645[2] violates the Establishment Clause. Further, this brief addresses only the principles of law under the Establishment Clause relevant to understanding this case, and in doing so it corrects a few misstatements of law by the courts below. Amici do not take the next step and apply these principles of law to Petitioners' actions, nor do Amici urge upon the Court suggested findings of fact concerning whether or

[2] Proclamation No. 9645, *Enhancing Vetting Capabilities and Process for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, 82 FED. REG. 45,161 (Sept. 24, 2017).

not Petitioners did violate the Establishment Clause in issuing Proclamation No. 9645.

I. Respondents must properly match the Establishment and Free Exercise Clauses to the nature of each plaintiff's harm and the scope of the remedy sought.

A. The nature of the harms.

The State of Hawaii was correct to invoke the Establishment Clause rather than the Free Exercise Clause. The Free Exercise Clause[3] only safeguards parties from religious harm, and the State of Hawaii has no religion and, therefore, cannot have suffered a religious harm. The text of the Free Exercise Clause requires that a person or organization first have a religion before that religion can be exercised. This means that there is no claim under the Free Exercise Clause for the nonreligious. *Frazee v. Illinois Dep't of Empl. Security*, 489 U.S. 829, 833 (1989) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause; secular views will not suffice); *Thomas v. Review Bd.*, 450 U.S. 707, 713-14 (1981) (noting that only beliefs rooted in religion are protected by the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (identifying religious claims that are "personal" and "philosophical" and those "merely a matter of personal preference" as not protected by free

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[3] "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST., Amend. I.

exercise). This understanding aligns with the drafting history of the Free Exercise Clause in the First Federal Congress of 1789. *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 525-67 (2011) [hereinafter "Esbeck, 2011 Utah L. Rev."]. *See id.* at 563.[4]

By way of contrast, the Establishment Clause can be a means of redress for both religious harms and nonreligious harms.[5] This is so because the text of the Establishment Clause is a two-way clause[6]: It sometimes acts to prevent government from wrongfully interfering with religion (e.g., co-opting the church for ends of the state[7]), and the clause sometimes acts to restrain government in a misguided attempt to aid or advance a religion (e.g., law against teaching evolution

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[4] A person who does not profess a religion, including an atheist or agnostic, can state a claim under the Free Speech Clause. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (striking down law permitting censorship of films because deemed "sacrilegious").

[5] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (Establishment Clause does not require "proof that particular religious freedoms are infringed").

[6] "Congress shall make no law respecting an establishment of religion." U.S. CONST., Amend. I. Government can make a law about religion that wrongly seeks to advance religion but that ends up causing harm to religion or to others. And government can make a law about religion that wrongly seeks to co-opt religion to the purposes of the state. Hence, it is a two-way clause.

[7] *See, e.g., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (undertaking by state to transfer control of Russian Orthodox Church from its governing hierarchy in the U.S.S.R. to church officials in the U.S. is unconstitutional).

in public schools[8]). As to the latter, this Court has entertained lawsuits by plaintiffs claiming violations of the Establishment Clause where there has been economic harm or loss of property,[9] constraints on academic inquiry by teachers and students,[10] and a hindrance to atheists.[11]

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[8] *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down law prohibiting teaching the theory of evolution in public schools as a violation of the Establishment Clause).

[9] *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (upholding claim by department store against Sabbath labor law); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (upholding claim of tavern seeking issuance of a liquor license); *cf. McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961) (permitting claim of economic harm by retail stores to be free of Sunday-closing law, but ultimately ruling against the stores on the merits); *Two Guys from Harrison Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (same).

[10] *See Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public school science classes if evolution is taught); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

[11] *See Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso*, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement was in violation of the First Amendment without specifying either Religion Clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not (indeed, by definition could not) suffer a religious injury as he professed to have no religion. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in God is a subject that remains in the sphere of religion, not the state.

The State of Hawaii alleges proprietary harm to its own offices, including hindering the operation of the state university, and tourism losses as a result of Proclamation No. 9645. Tr. 79a-80a. Relief for these types of injuries is cognizable under the Establishment Clause. Such injuries are consequential to the operation of the Establishment Clause as it works to structure relations between church and state. This ordering function, illustrated by the three cases of *Caldor, Edwards*, and *Torcaso* (*see supra* notes 9-11), is to restrain government from preferring religion over secular concerns in the spheres of, respectively, commerce, teaching science, and delineating qualifications for public office. These economic and other temporal injuries are within the range of harms that are consequential when there is a failure to keep in proper relationship these two centers of authority: government and religion.[12] In such instances, the task of the Establishment Clause is not rights-based and personal, but to police the boundary between church and state much like a separation-of-powers clause. This is why in popular discourse there are sometimes contexts in which it is

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[12] As this Court wrote in *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Id.* at 212. In reference to the Establishment Clause, this Court in *Engel v. Vitale*, 370 U.S. 421 (1962), said that the clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Id.* at 431.

useful to speak in terms of the "separation of church and state" in referring to the Establishment Clause.

The individual Respondents (Dr. Ismail Elshikh and John Does 1 and 2) and the associational Respondent (Muslim Association of Hawaii, Inc.) are adherents to Islam. In the Third Amended Complaint (Tr. 72a n.4), these Respondents stated a claim under the Free Exercise Clause for religious harm. Tr. 76a-77a n.8. However, neither the district court nor the Ninth Circuit Court of Appeals reached these free-exercise claims. Tr. 92a-99a (district court finding likelihood of success on secs. 1182(f) and 1185(a) claims but no others); Tr. 99a-101a (district court finding likelihood of success on sec. 1152(a) claim but no others); and Tr. 65a (Ninth Circuit disposing of case on statutory grounds, thus not reaching constitutional claims). And because of this Court's limited grant of the petition for writ of certiorari, the Free Exercise Clause claims are not before this Court. These claims are not abandoned, however, and should there be a remand for further consideration of this case on the merits, the individual and associational Respondents may continue to pursue the Free Exercise Clause as a basis for seeking relief from Proclamation No. 9645.

That said, the individual and associational Respondents also can obtain relief for religious harms under the Establishment Clause. *See Larson v. Valente*, 456 U.S. 228 (1982). This is one of those instances where the Free Exercise and Establishment Clauses

partly overlap,[13] both provisions affording a remedy to these individual and associational claimants for religious injury.

B. The scope of the remedy.

Even when the Religion Clauses overlap with respect to liability, the scope of the remedy available under each clause is not the same. For example, in archetypal Establishment Clause cases such as those concerning religion in public schools, *Engel v. Vitale*, 370 U.S. 421 (1962), and *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court applied the Establishment Clause not to relieve individual students of personal religious coercion, but to keep in proper relationship two centers of competence: government and religion.[14] In *Engel*, the Court considered a state

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[13] For there to be instances where a single factual setting gives rise to two violations of the Constitution is not unusual. For example, both the Free Speech and Free Exercise Clauses are violated when a public school denies equal access to a student religious organization to meet on campus. *Cf. Good News Club v. Milford Central School*, 533 U.S. 98 (2001). What does not make sense is the occasional dicta that the Establishment Clause and the Free Exercise Clause are in "tension" and even conflict. That is not possible. *See* Esbeck, 2011 Utah L. Rev. at 601-08.

[14] The key insight to differentiating the two Religion Clauses came in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963):

> [I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent – a violation of the Free Exercise Clause is predicated on coercion

program of daily classroom prayer in the public schools. Students not wanting to participate were excused without penalty. 370 U.S. at 423 n.2. However, the program was struck down as to all students despite the absence of religion being imposed on every student. *Id.* at 430-31. In *McCollum*, the Court considered a program that permitted persons from the community to come onto the campus of the public school and conduct elective classes in religion. Student enrollment was optional and required parental permission. 333 U.S. at 207 n.2. Yet, the program was struck down as to all students despite the absence of religion being imposed against the will of every student. *Id.* at 232-33 (Jackson, J., concurring). The broad school-wide remedy in both cases was to restore the proper ordering of church and state, not just to make whole the individual students who sued seeking redress for their personal religious coercion.

In contrast, relief under the Free Exercise Clause in *Engel* and *McCollum* would have been narrow, with the injunction giving relief only to those students objecting to the explicitly religious practices. The religious practices would have continued in the schools for those students who wanted to engage in them. As we will see in Part II, below, this same difference in scope of remedy under the Establishment Clause in comparison to the Free Exercise Clause is also present in the

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while the Establishment Clause violation need not be so attended.

Id. at 223. *See also id.* at 224 n.9.

instant case with respect to the individual and associational Respondents.

C. Care must be exercised to avoid conflating the elements of a claim under the Establishment Clause with the requirements of standing.

Amici express no opinion as to whether any of the Respondents has independently met the requirements for standing to sue. Nonetheless, care must be exercised to not conflate the elements of a successful claim under the Establishment Clause with the requirements of showing standing to sue.

The individual Respondents claim standing in their own right. Tr. 20a-21a. To have standing, the Muslim Association of Hawaii, Inc., also must have suffered its own injury or have associational standing on behalf of its members. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). *See* Tr. 22a (allegations of injury by Association and its members). Similarly, the State of Hawaii must have standing to sue in its own right.

In a case related to this one, the Fourth Circuit hopelessly intertwined the required showing of particularized injury-in-fact to have standing, a question going to the court's subject matter jurisdiction under Article III of the U.S. Constitution, with the nature of injuries redressed by the Establishment Clause. *See Int'l Refugee Assistance Project v. Trump*, ___ F.3d ___, 2018 WL 894413, at *7-11 (4th Cir. Feb. 15, 2018)

(en banc). Further, the Fourth Circuit confused harm by the government, for which the Establishment Clause might be a restraint, with harm done by non-governmental actors that are not restrained by the Establishment Clause (or, for that matter, any other clause of the Bill of Rights).

Similarly, the Fourth Circuit misused cases on standing where the alleged Establishment Clause harm is unwanted exposure to the government's religious speech. *Id.* at 2018 WL 894413, at *7-8. Whatever issues it otherwise presents, Proclamation No. 9645 is not a situation of unwanted exposure to the government's religious expression, like a courthouse posting of the Ten Commandments. *See* Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 Charleston L. Rev. 607 (2013) (collecting all of this Court's "unwanted exposure" cases).

Finally, it was a mistake for the Fourth Circuit to have relied on cases involving federal taxpayer standing, 2018 WL 894413, at *6-8. For historical reasons that this Court has tied to Virginia's disestablishment in 1784-1786, taxpayer cases depart from standing norms. *See* Esbeck, 7 Charleston L. Rev. at 610-16.

II. The principles of law under the Establishment Clause relevant to the claims in the instant case make actionable intentional discrimination among religions.

The Establishment Clause prohibits government from intentionally discriminating among religions. *Larson v. Valente*, 456 U.S. 228 (1982).[15] That is the heart of the claim here, namely: Petitioners are alleged to have targeted Muslim immigrants from certain countries because the nations are majority Muslim. There need be no showing of malice or animus, only proof that the government intended to discriminate among religions. In a related case, the Fourth Circuit was mistaken when it said plaintiffs similarly situated to Respondents here had to show animus to prove a violation of the Establishment Clause. *Int'l Refugee Assistance Project v. Trump*, ___ F.3d ___, 2018 WL 8944134 *6, *7, *17 (4th Cir. Feb. 15, 2018) (en banc).

In *Larson*, a state charitable solicitation act that intentionally favored well-known churches and

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[15] Where the government is alleged to violate the Establishment Clause by favoring religion over the secular, this Court has rightly distinguished between religious preferences and religious exemptions. The Establishment Clause will generally strike down a religious preference. Religious exemptions are altogether different, however, and have been consistently upheld by this Court because exemptions do not entail "state action" that causes harm to others. *See* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Kentucky L. J. no. 4 (forthcoming May 2018), http://ssrn.com/abstract=2952370.

societies with longevity in the community, while imposing regulatory burdens on new religious movements, was found at odds with the Establishment Clause. The *Larson* Court relied on direct evidence that the discrimination was intentional. 456 U.S. at 246 n.23.

The *Larson* Court's review was not merely of the text or face of the state legislation, but examined the whole set of circumstances in a search for evidence of intentional discrimination. *Id.* at 254-55. Similarly, this Court has struck down municipal practices and ordinances that upon a full review of the evidence were found to intentionally discriminate among religions based on the local churches involved having different ways of conducting their worship meetings. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953) (finding First Amendment violated by ordinance that permitted church worship services in city park but disallowed other religious meetings as intentionally preferring some religions over others based on a given sect's type of religious gathering); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (finding that freedom of religion, freedom of speech, and equal protection all violated when municipality denied use of a city park to conduct Bible talks but permitted gatherings by other religious organizations and for Sunday-school picnics).

The only other Supreme Court case utilizing the Establishment Clause as a source of redress for religious injury is *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette*, the Court held that an exemption from the military draft for those religiously opposed to

all war, but not for those willing to fight in a "just war," was not intentionally discriminatory on the basis of religious affiliation and thus did not violate the Establishment Clause. *Id.* at 450-54. Hence, *Gillette* acknowledged the Establishment Clause as a potential source of redress for religious harm, but the Court then went on to hold that this particular claim was without merit. *Larson* is thus the only Supreme Court case where religious injury was redressed pursuant to the Establishment Clause.

Although *Larson* is the leading case for the principle that government is prohibited by the Establishment Clause from discriminating among religions, it must be conceded that conceptually it is an awkward decision. It would have been more straightforward to argue that the state's intentional discrimination among religious groups was injurious to the disfavored religion. If that had been done in *Larson*, the Court could have decided the case under the Free Exercise Clause.[16] The relief granted, moreover, would have been as applied, that is, the injunctive relief would have been specific to the plaintiff, Holy Spirit Association for the Unification of World Christianity ("Unification Church"). This is because an as-applied remedy is all that would be required to relieve the Unification

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[16] The oddity of deciding *Larson* under the Establishment Clause is further evidenced by the Court using the compelling-interest test rather than the three-prong *Lemon* test. *Larson*, 456 U.S. at 246, 251, 255. Of course, if the case had been resolved under the Free Exercise Clause, the Court's standard at the time would have been the compelling-interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963).

Church of religious coercion. *See supra* note 14 (one difference between the Free Exercise and Establishment Clauses is that the former requires a showing of coercion). Compare text accompanying *supra* note 14 (discussing how *Engel* and *McCollum* illustrate that the Establishment Clause warrants striking down the offending law on its face, a remedy broader in scope than the remedy available under the Free Exercise Clause).

Again, it initially seems awkward to resolve *Larson* under the Establishment Clause, as the Court did. The text of the Establishment Clause negates the government's power to make a law about "an establishment of religion," which sets one in search of an offending law aiding or advancing a religion. That suggests conceptualizing the State of Minnesota's intentional discrimination as "an establishment" not because it hindered the disfavored religion, but because the discrimination brought about an establishment by enhancing the fortunes of other religions. Tracking the facts in *Larson*, the paradigm is that by putting regulatory barriers before new religious movements, the State of Minnesota was establishing churches that were well known and long-standing in the community. But it is speculative whether hindering the Unification Church had the actual effect of aiding Minnesota's Protestants, Catholics, and Jews. Discrimination against a religion does have the theoretical potential of helping other religions, but then again it may turn out to be of no discernable benefit to the religious competition.

The Establishment Clause claims by the Respondents here are conceptually awkward in the same

manner as *Larson*, namely: The targeting of the individual and associational Respondents because they are Muslim might be said to have the consequential effect of establishing – that is, aiding – other religions. Of course, it is speculative that Proclamation No. 9645 has positive consequences for other religions in the United States, such as Christianity and Judaism. In the absence of evidence to the contrary, it is just as likely that Proclamation No. 9645 has no impact on the fortunes of Christianity, Judaism, or any other religion that operates in America.

To think of "an establishment" as generally aiding or advancing long-standing religions is not, however, the only meaning of "an establishment." For example, in the late eighteenth-century, as thirteen British colonies in North America declared their independence, most of the new state constitutions had a religious test for public office. *See* Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 34, 50, 60, 64, 71, 73, 75, 78-80, 81, 150-51, 153, 158, 160, 162, 170-71, 184, 186, 188-89, 210, 212, 222 (Oxford, 1986) (discussing religious tests or oaths); Anson Phelps Stokes, *Church and State in the United States* 358-446 (Harper, 1950) (disestablishment process from 1776 to 1833 in thirteen states and Vermont). Some required that office-holders subscribe to a religious creed or be a Protestant. Other states, thought progressive for the day, required that office-holders be Christian, thus allowing Catholics to serve as well. As the process of state-by-state disestablishment gained momentum, these religious tests were

slowly liberalized or dropped altogether as constitutions were amended or states adopted new ones.

All of which is to say, there is more to the forbidden "make no law respecting an establishment" than the setting up of a full-fledged national church. Lesser, more subtle, laws in time were regarded as "an establishment." Indeed, this Court already tacitly reached this conclusion when it recognized "an establishment" in a case like *Larkin* where granting churches an absolute veto over issuance of a liquor license to nearby taverns was found to be a form of "establishment"; in a case like *Caldor* where the conferring on employees of an absolute right to their Sabbath off no matter the burden on the employer or fellow employees was found to be "an establishment"; and in *Epperson* where a prohibition on the teaching of evolution in public-school science class was also found to be a form of "establishment."[17] Accordingly, it is an easy step to find that government, by intentionally imposing a regulatory burden on a wide class of Muslims, as Proclamation No. 9645 is alleged to do, is "an establishment" as that term appeared in the First Amendment.

In light of the above, the individual and associational Respondents state a claim under the Establishment Clause for religious injury when they allege that

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[17] In order to help define "an establishment," scholars have composed lists of the several elements that historically supported the established church in Great Britain and here in the American colonies turned states. Religious tests for public office were just one of the collection of elements that together comprised an establishment. For two such lists, *see* Carl H. Esbeck, 2011 Utah L. Rev. at 533-34 n.185.

Proclamation No. 9645 was issued by Petitioners with the intent of discriminating against Muslims. As stated previously, Amici do not take the next step and apply this principle of law to Petitioners' actions, nor do Amici urge upon the Court suggested findings of fact concerning whether or not Petitioners did violate the Establishment Clause in issuing Proclamation No. 9645.

III. Although the *Lemon* test has not been utilized by this Court for over a decade, the lower courts continue to rely upon it to their detriment.

The collective three-prongs of the *Lemon* test, secular purpose, primary effect, and excessive entanglement, were first set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The *Lemon* test has not been utilized by this Court for over twelve years. *See McCreary County v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments posted in two Kentucky county courthouses were unconstitutional because the displays were mounted with the purpose of advancing religion). Yet, the lower courts continue to rely upon it to their detriment. *See, e.g.*, the district court's wrestling with the *Lemon* test in *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017) (holding immigration ban unconstitutional on multiple bases, including the Establishment Clause), *aff'd., Int'l Refugee Assistance Project v. Trump*, ___ F.3d ___, 2018 WL 894413 (4th Cir. Feb. 15, 2018) (en banc). The district

judge is not just struggling with the meaning of the purpose prong, but ignoring this Court's narrow application (*see infra* note 18) in favor of a purpose prong of broad scope. 265 F. Supp. 3d at 618-19.

The *Lemon* one-size-fits-all verbal map is not only divorced from historical considerations, but it is too crude a template to resolve the full range of cases that arise under the Establishment Clause. Barrels of printer's ink have been spilt explaining that the various words of *Lemon*'s prongs are not to be taken literally, but that they mean something other than what the words mean in plain English. Thus, for example, "secular purpose" does not mean secular purpose. Rather, secular purpose means a purpose other than a purpose that cannot be explained except by using words that are explicitly religious.[18]

The reality is that Establishment Clause cases are resolved by application of a series of principles or rules

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[18] Under this Court's current application of the "secular purpose" prong, a law will be invalidated "only if it is motivated wholly by an impermissible purpose," or when it cannot be said that "on the whole, religious concerns were not the sole motivation." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). Likewise, there is not the required secular purpose only when it can be said that the law's "pre-eminent purpose . . . is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curium). Conversely, this Court has said that "a statute that is motivated in part by a religious purpose" does not violate the prong (*Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)), nor is it required that a "law's purpose must be unrelated to religion," for that would require government to "'show a callous indifference to religious groups.'" *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

worked out over the years in this Court's cases. A given set of circumstances calls for the application of a certain principle of law.[19] The *Lemon* test is not only of little assistance to the lower courts in this task, it is often detrimental. At best, it wastes the resources of petty officials and the lower courts as they try to be faithful to the "test." At worst, *Lemon* muddles the public's understanding of the Court's rationale and undermines confidence in the rule of law. It is an open secret, moreover, that *Lemon*'s accretion, the no-endorsement test, is an invitation to read into the Establishment Clause one's cultural bias. *See* Steven Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987). It would be useful, accordingly, for this Court to note in its opinion that the *Lemon* test, in all its iterations, has fallen into disuse.

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[19] In addition to the principle of law stated in *Larson* and applicable to this case, a second example is: Government may not utilize classifications based on denominational or sectarian affiliation to impose burdens or extend benefits. *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 702-08 (1994) (plurality opinion). The rationale is that the Court wants to avoid making membership in a religious denomination more or less attractive. A third example is the rule that civil authorities are not to probe the validity, meaning, or importance of religious events, practices, and teachings. *See Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981). There are another half dozen principles of law well known to those who practice in this area. Following these principles is far more surefooted than *Lemon*'s guesswork, the latter leaving too much discretionary power in the hands of the federal judiciary.

CONCLUSION

Amici urge that the Court apply the following principle of law: The Establishment Clause prohibits government from intentionally discriminating among religions. Amici urge that this Court hold that the State of Hawaii can properly invoke the Establishment Clause as a means of redress for its alleged nonreligious harms such as pecuniary injury, damage to property, and loss of economic opportunities. Amici also urge that this Court hold that the Establishment Clause claims by the individual (Dr. Ismail Elshikh and John Does 1 and 2) and the associational (Muslim Association of Hawaii, Inc.) Respondents seeking relief from alleged religious harms are cognizable. Should any of the Respondents succeed in proving a violation of the Establishment Clause, then the proper scope of the remedy is that the offending law is facially unconstitutional.

Respectfully submitted,

KIMBERLEE WOOD COLBY
Counsel of Record
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
703-894-1087
kcolby@clsnet.org

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